SUPREME COURT
APR 2004
TERM

STATE OF MICHIGAN
IN THE SUPREME COURT

MARGARET JENKINS, as Personal Representative of the ESTATE OF MATTIE HOWARD, Deceased,

Plaintiff-Appellee

vs.

JAYESH KUMAR PATEL, M.D., and COMPREHENSIVE HEALTH SERVICES, INC., a Michigan Corporation, d/b/a THE WELLNESS PLAN, Jointly and Severally,

Defendants-Appellants

/

Supreme Court
No. 123957

Court of Appeals
No. 233116

Wayne County Circuit
Court No. 98-808834 NH

AMICUS CURIAE BRIEF OF MICHIGAN STATE MEDICAL SOCIETY

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STATEMENT OF BASIS OF JURISDICTION

Amicus Curiae Michigan State Medical Society relies upon the Statement of Basis of Jurisdiction contained in the Brief of Appellants Jayesh Kumar Patel, M.D., and Comprehensive Health Services d/b/a The Wellness Plan.

STATEMENT OF QUESTION PRESENTED

Is the medical malpractice noneconomic damages cap applicable to actions for wrongful death?

The Court of Appeals said "No."

Plaintiff-Appellee says "No."

Defendants-Appellants say "Yes."

Amicus Curiae MSMS says "Yes."

STATEMENT OF FACTS AND PROCEEDINGS

Absent an independent basis for reciting the facts, Amicus Curiae Michigan State Medical Society relies upon the Statement of Facts and Proceedings contained in the Brief of Appellants Jayesh Kumar Patel, M.D., and Comprehensive Health Services d/b/a The Wellness Plan.

SUMMARY OF THE ARGUMENT

One of the issues before this Court relates to the applicability of the noneconomic damages cap to an action for wrongful death based on allegations of medical malpractice. The medical malpractice noneconomic damages cap, MCL 600.1483, is an integral component of Michigan's tort reform initiative. It was designed to "control increases in health care costs by reducing the liability of medical care providers, thereby reducing malpractice insurance premiums, a large component of health care costs." *Zdrojewski v Murphy,* 254 Mich App 50, 71; 657 NW2d 721 (2002).

As originally enacted in 1986, the statute contained several exceptions that rendered the cap inapplicable if one of the excepted conditions, among them, death, existed. However, the Legislature *expressly deleted the exceptions for death and other conditions* when the statute was amended in 1993. The present statute contains no exceptions whatsoever, although it subjects certain conditions, not including death, to a higher cap. The plain language of the damages cap compels its application in "an action for damages alleging medical malpractice" and provides that the lower cap "shall" apply in every such action unless one of several enumerated conditions exist, in which case a higher cap "shall" apply. Thus, in every case alleging malpractice, either the lower cap or the higher cap applies.

In an April 1, 2003 published decision, the Michigan Court of Appeals held that the damages cap did not apply to actions brought under the wrongful death act, MCL 600.2922. The Court opined that the wrongful death damages act "mandates recovery in any amount, limited only to the degree that the amount be fair and equitable ..." The Court further held that under the ejusdem generis doctrine of statutory construction, the definition of noneconomic loss contained in the cap did not encompass the type of damages recoverable for wrongful death, but solely related to damages sustained by an individual surviving

plaintiff. The Court of Appeals' decision is incorrect and improperly resurrects the death exception.

In addition to violating the plain language of the statute, the Court of Appeals' decision ignores the legislative purpose in enacting the statute. Under no circumstances can the result achieved by the Court's construction of the statute be reconciled with the reasons for its enactment. Nor can it be harmonized with the history of the act. The decision is also at odds with well-established rules of statutory construction including: the obligation to construe an amendment as a change in the statute; the obligation to carefully scrutinize statutory exemptions and not to extend them beyond their plain meaning; the obligation to give special statutes precedence over general enactments; the obligation to construe more recent enactments, if found to conflict with prior enactments, as controlling; and the obligation to avoid an application of the ejusdem generis doctrine that conflicts with the meaning and intent of the statute.

MSMS is a professional association that represents the interests of over 14,000 physicians in the State of Michigan. MSMS spent years analyzing the medical liability crisis in Michigan and joined numerous other organizations and entities advocating the promulgation of this tort reform legislation. The Court of Appeals' decision undermines these efforts and will have serious and far-reaching consequences in the legal and medical arenas. For reasons more fully explained below, reversal is required.

ARGUMENT[1]

This appeal presents an issue of statutory construction subject to de novo review. *Pittsfield Charter Township v Washtenaw County,* 468 Mich 702, 707; 664 NW2d 193 (2003); *Roberts v Mecosta Co Gen Hosp,* 466 Mich 57, 62; 642 NW2d 663 (2002).

THE NONECONOMIC DAMAGES CAP APPLIES TO WRONGFUL DEATH ACTIONS.

The issue raised by this appeal seeks to resolve a manufactured tension between two perfectly compatible statutes: Michigan's wrongful death damages act, MCL 600.2922, Apx. p 70a, and the medical malpractice limitation on damages for noneconomic loss, MCL 600.1483, known as the "noneconomic damages cap," Apx. p 68a. The statutes serve different purposes but dovetail at the point at which damages are to be determined in a wrongful death action based on a claim of medical malpractice. The Court of Appeals found a disparity between the damages allowable under the two statutes and ultimately held that the wrongful death act governed recovery for loss of society and companionship, undiminished by the noneconomic damages cap.

The conclusion that the noneconomic damages cap does not apply to wrongful death actions is, in every respect, contrived and cannot be reconciled with the very plain language of the statute itself. It ignores the legislative purpose in enacting the statute, and cannot be harmonized with the history of the act, particularly the deletion by amendment of an exception for death that appeared in the original act. The decision is also at odds with other

[1] Appendix cites refer to the Appendix for Defendants-Appellants Jayesh Kumar Patel, M.D., and Comprehensive Health Services, Inc., d/b/a The Wellness Plan.

well-established rules of statutory construction. The Court summarily dismissed, disregarded or misconceived these obligations to reach the desired result. Reversal is required.

A. The Permissive Language Of The Wrongful Death Act Damages Provision Does Not "Mandate" Unlimited Recovery For Loss Of Society And Companionship And Does Not Preclude The Expressly Mandatory Application Of The Noneconomic Damages Cap.

The Court of Appeals purported to begin its inquiry by examining the applicable statutes. But the plain language of those statutes did not compel the conclusion reached – indeed it opposed such a result. It was only through a tortured application of the ejusdem generis doctrine and a flagrant disregard for other applicable principles that the noneconomic damages cap was found not to apply.

1. The Language Of The Wrongful Death Act Damages Provision Is Permissive.

Examining the language of the wrongful death act, MCL 600.2922(1), the Court deemed it "beyond dispute" that the wrongful death act applies in the context of medical malpractice when death is caused by the wrongful act of another (a proposition no one disputed).[2] The Court then considered Section 6 of the Act, MCL 600.2922(6), which provides in pertinent part:

> In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. . . .

[2] In *Hawkins v Regional Medical Laboratories, PC,* 415 Mich 420, 436; 329 NW2d 729 (1982), this Court observed that the mere fact that the "legislative scheme requires that suits for tortious conduct resulting in death be filtered through the so-called 'death act' ... does not change the character of such actions except to expand the elements of damages available."

Observing that this section "directs a court or jury in '*every action*' to award damages as the court or jury shall consider fair and equitable" and "specifically encompasses 'loss of society and companionship of the deceased,'" the Court found that, "standing alone, the WDA *mandates recovery in any amount*, limited only to the degree that the amount be fair and equitable, for noneconomic losses, including those for loss of society and companionship." *Jenkins v Patel,* 256 Mich App 112, 119; 662 NW2d 453 (2003) (emphasis added).

Contrary to the Court of Appeals' selective quotation and glib conclusion, the wrongful death act does not "*mandate* recovery in *any* amount, limited only to the degree that the amount be fair and equitable, for noneconomic losses ..." *Id.* (emphasis added). The statute states that the court or jury "*may* award damages as the court or jury shall consider fair and equitable, under all the circumstances including ... damages for the loss of ... society and companionship of the deceased." MCL 600.2922(6). The Court of Appeals wrongfully equates "may" with "directs" and "mandates." But use of the word "may," as this Court has stated, is *permissive*, not mandatory. *Tobin v Michigan Civil Service Comm,* 416 Mich 661, 667; 331 NW2d 184 (1982).

In *Tobin,* plaintiff argued that language in the Freedom of Information Act providing that a public body "may exempt from disclosure as public record under this act" a lengthy list of documents meant that disclosure of the records was prohibited. This Court did not agree that "may" must be taken to mean "shall." This Court said:

> The plaintiffs argue that the Court of Appeals clearly erred in interpreting "may" to mean "may" rather than "shall". We disagree. The words "may" and "shall are to be given their ordinary and primarily accepted meaning.

Id. at 667.

In fact, there are no words in the wrongful death damages statute that mandate recovery for loss of society and companionship in an unlimited amount. The Court of Appeals' finding to the contrary is wrong.

2. The Language Of The Noneconomic Damages Cap Mandates Its Application To Actions For Medical Malpractice.

Application of the noneconomic damages cap, on the other hand, *is* mandatory. The statute unequivocally provides that "*[i]n an action for damages alleging medical malpractice* by or against a person or party, the *total amount of damages* for noneconomic loss *recoverable* by all plaintiffs, resulting from the negligence of all defendants, *shall not exceed* $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply ... in which case damages for noneconomic loss *shall not exceed* $500,000.00." MCL 600.1483(1) (emphasis added).[3]

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[3] The 1993 version of MCL 600. 1483, Apx. p 68a, provides:

> (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:
>
> > (a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent function loss of 1 or more limbs caused by 1 or more of the following:
> >
> > (i) Injury to the brain.
> > (ii) Injury to the spinal cord.
> >
> > (b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

Use of the word "shall" unquestionably expresses a mandatory directive. *Roberts v Mecosta County General Hospital,* 466 Mich 57, 65; 642 NW2d 663 (2002)("[t]he phrases 'shall' and 'shall not' are unambiguous and denote a mandatory, rather than discretionary action."); *Scarsella v Pollak,* 461 Mich 547, 549; 607 NW2d 711 (2000). Further, death is not an exception to the present statute, although it was expressly listed as an exception in the original 1986 version of the statute.[4] Thus, under the express language of the statute, the lower cap applies to medical malpractice claims involving death. This conclusion requires no special rules of statutory construction. The mandatory language of the statute is clear. The Court should have applied the statue as written. The failure to do so was error.

B. Given The Plain Language Of The Statutes, Judicial Construction Was Neither Necessary Nor Allowed.

When reviewing statutory matters, a Court's primary purpose "is to discern and give effect to the Legislature's intent." *Robertson v DaimlerChrysler,* 465 Mich 732, 748; 641 NW2d 567 (2002). In the first instance, the legislative intent is to be derived from the specific language of the statute inasmuch as the Legislature "is presumed to have intended the meaning it has plainly expressed." *Id.* The words used are "not to be ignored, treated as

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> (c) There has been permanent loss of or damage to a reproductive organ resulting in inability to procreate.

[4] The 1986 version of MCL 600.1483, Apx. p 67a, provides in part:

> (1) In an action for damages alleging medical malpractice against a person or party specified in Section 5838a, damages for noneconomic loss which exceeds $225,000.00 shall not be awarded unless 1 or more of the following circumstances exist:
>
> (a) There has been a death.
>
> ...
>
> (3) "Noneconomic loss' means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

surplusage, or rendered nugatory." *Id.* When the language is clear and unambiguous, judicial construction is not permitted and the statute must be enforced as written. *Id.* As this Court recently explained in *In re Certified Question, Henes Special Projects Procurement, Marketing and Consulting Corp v Continental Biomass Industries, Inc,* 468 Mich 109; 659 NW2d 597 (2003), wherein it was asked to determine the standard for evaluating the mental state required to assess double damages under the Michigan Sales Representative Commission Act:

> A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin,* 443 Mich 59, 65; 503 NW2d 435 (1993). The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. *Sun Valley Foods Co v Ward,* 460 Mich 230; 596 NW2d 119 (1999). When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n,* 448 Mich 22, 27; 528 NW2d 681 (1995).

Id. at 113. *See also, Eggleston v Bio-Medical Applications of Detroit, Inc,* 468 Mich 29, 32; 658 NW2d 139, 141 (2003)("If the language of a statute is clear, no further analysis is necessary or allowed."); *Omelenchuck v City of Warren,* 461 Mich 567, 575; 609 NW2d 177 (2000)(refusing to rewrite the tolling statute to add words to the statute); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999)(the Court's primary task of discerning and giving effect to the Legislative intent "begins by examining the language of the statute itself."); *People v Herron,* 464 Mich 593, 611; 628 NW2d 528 (2001)("We must give the words of a statute their plain and ordinary meaning . . . .")(quoting *People v Morey*, 461 Mich 325, 329-30; 603 NW2d 250 (1999)); *Storey v Meijer, Inc*, 431 Mich 368, 376; 429 NW2d 169 (1988)("Legislative intent is to be derived from the actual language of the statute, and when the language is clear and unambiguous, no further interpretation is necessary.").

A court may not speculate about the Legislature's intent beyond the words expressed, *Rheaume v Vandenberg,* 232 Mich App 417, 422; 591 NW2d 331 (1998), but must enforce the law as written. Nor may the court second-guess the wisdom of the statute and use rules of construction as a means of imposing its own policy preferences. As this Court explained in *Robertson, supra:*

> "Our judicial role precludes imposing different policy choices than those selected by the Legislature. ..."

465 Mich at 751 (quoting *People v Sobczak-Obetts,* 463 Mich 687, 694-695; 625 NW2d 764 (2001).

The Court of Appeals ignored the plain language rule here, reaching the result it desired by focusing on the wrongful death statute's definition of noneconomic loss, which provides:

> (3) As used in this section, "noneconomic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

MCL 600.1483(3).[5] Referring to this definition, the Court found that "express language contained in § 1483 ... indicates that it does not apply in wrongful death actions." *Jenkins, supra,* 256 Mich App at 121.

There is no "express language" in MCL 600.1483 that exempts the damages recoverable in wrongful death actions, but the Court applied the ejusdem generis doctrine to "find" an exclusion. The Court explained:

> Noneconomic loss is defined in the statute as meaning "damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss." MCL 600.1483(3). Although the definition references "other noneconomic loss," it does not specifically touch on loss of society and companionship, which are unmistakenly associated with

[5] The same definition was contained in the 1986 statute.

> a wrongful death action....Therefore, we must determine whether "other noneconomic loss" was meant to cover damages associated with loss of society and companionship, or in other words losses related to wrongful death.

Jenkins, supra, at 122-123. Under the plain language rule, there was no reason to question whether noneconomic loss included damages for loss of society and companionship. Damages for loss of society and companionship are unequivocally "noneconomic" in nature, and "noneconomic" was the only criteria defining the nature of the loss capped. But, as it appears, the Court of Appeals imposed other criteria. Applying the doctrine of "ejusdem generis," whereby "general words that follow a designation of particular subjects" are "presumed to include only things of the same kind, class, character, or nature as the subjects enumerated," the Court held that the catchall "other noneconomic loss" was not of the same "kind, class, character, or nature as those associated with a wrongful death action" because the preceding examples could only apply to a surviving plaintiff. *Id.* at 123. To impose this additional "surviving plaintiff" criteria on the "noneconomic loss" capped by the statute, the Court "reasoned":

> Here, damages or loss due to pain, suffering, inconvenience, physical impairment, and physical disfigurement clearly relate to damages sustained by an individual surviving plaintiff rather than damages sustained by next of kin in a wrongful-death action who are represented by the personal representative. There is no specific mention of damages or losses unique to relatives of a person who has died, such as loss of society and companionship. There are at least four other statutes that we are aware of in which our Legislature has defined noneconomic loss or damage as specifically including loss of society and companionship, MCL 600.2945, 600.2969, 600.2970 and 691.1415. However, the Legislature has not done so here. Loss of society and companionship verbiage has been included in case law dating back as far as 1899. *Lafler v Fisher,* 121 Mich 60; 79 NW 934 (1899). We can only conclude that the examples of noneconomic losses specifically enumerated in § 1483 are not of the same kind, class, character, or nature as those associated with a wrongful-death action. Therefore, under the doctrine of ejusdem generis, "other noneconomic loss" as used in § 1483(3) does not refer to noneconomic losses related to wrongful-death actions.

Id. at pp 124-125 (footnotes omitted). The Court thus concluded that considering "only the language of the statutes," the Legislature "intended the WDA to exclusively govern all areas of a wrongful-death action as expressed in its language, including the award of noneconomic damages," and "did not intend the damages cap to limit those damages in a wrongful-death, medical malpractice action." *Id.* at p 125-126 (footnotes omitted).

It is clear that the Court of Appeals went way out of its way to reach this conclusion. Given the permissive language of the wrongful death damages provision regarding what a jury or court may award, the mandatory limitation of the noneconomic damages cap as to what all plaintiffs shall recover, and the definition of "noneconomic loss" the Legislature intended to cap - which was not written with a "surviving plaintiff" modifier - the plain meaning of the statutes was clear. Resort to rules of construction to change that meaning, particularly the ejusdem generis doctrine, was clearly unauthorized. There is no language in the wrongful death act damages provision that precludes application of the noneconomic damages cap, and no language in the noneconomic damages cap statute that exempts actions for wrongful death. Judicial construction was neither required nor allowed.

Rather, "where statutes relate to the same subject matter, they should be read, construed, and applied together to distill the Legislature's intent." *In re MCI,* 460 Mich 396, 412; 596 NW2d 164 (1999). In *Rusinek v Schultz, Snyder & Steele Lumber Co,* 411 Mich 502; 309 NW2d 163 (1981), the husband and wife plaintiffs brought a suit for damages arising out of an automobile accident. After the jury returned a verdict in favor of both plaintiffs, the Court of Appeals held that MCL 500.3135 of Michigan's No-Fault Insurance Act abolished the right of a spouse to recover in tort for loss of consortium despite the absence of any express words to that effect. The operative provision stated that a "person

remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). The statute further provided that "[n]otwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use of a motor vehicle ... is abolished except as to: ... (b) [d]amages for noneconomic loss as provided and limited in subsection (1)." MCL 500.3135(2)(b)(now MCL 500.3135(3)(b)). Finding it "undisputed" that loss of consortium is a noneconomic loss, the Court viewed the issue as whether

> "liability for noneconomic loss" refers only to losses suffered by the "injured person" who "has suffered death, serious impairment of body function or permanent serious disfigurement" or whether the phrase: "if the injured person has suffered death, serious impairment of body function or permanent serious disfigurement", is merely the statement of a threshold condition that must be met before another who suffers noneconomic loss may seek recovery in tort.

411 Mich at 505-506. The Court concluded that the no-fault act must be construed as retaining the common-law action for loss of consortium, explaining:

> The common-law action for loss of consortium in Michigan is not expressly abolished by the language of § 3135. If this section abolishes this common-law right it must be found to do so by implication. *There is nothing, however, in the language of the act or its legislative purposes that requires such a construction.* Since it is derived from the injured spouse's action, a claim of loss of consortium does not create a new case nor does it contribute significantly to the problems the act was intended to alleviate.

Id. at 508 (emphasis added).

Similarly, in *Hardy v County of Oakland,* 461 Mich 561; 607 NW2d 718 (2000), the Supreme Court was asked to decide whether the threshold requirements for an action for noneconomic damages under the no-fault act applied to a governmental agency that was being sued under the motor vehicle exception to the governmental immunity statute. Subsection 3135(1) of the no-fault act allowed an action for noneconomic tort damages only

on a showing that the plaintiff has "suffered death, serious impairment of body function, or permanent serious disfigurement." The immunity statute stated, without qualification, that a government agency is liable for "bodily injury and property damage resulting from the negligent operation ... of a motor vehicle." MCL 691.1405. In resolving the issue, the Supreme Court said:

> *The apparent conflict is readily resolved by resort to the plain language of these provisions.* Subsection 3135(2) of the no-fault act, which contains the partial abolition of tort liability, opens with the introductory clause, "Notwithstanding any other provision of law ..." On its face, therefore, this measure reflects the Legislature's determination that the restrictions set forth in the no-fault act control the broad statement of liability found in the immunity statute.

461 Mich at 565 (emphasis added) (footnotes omitted).

In the same manner, it is clear that the permissive language of the wrongful death damages provision easily accommodates the mandatory language of the noneconomic damages cap. The definition of noneconomic loss also speaks for itself. The Court of Appeals erred in judicially rewriting these statutes. Reversal is required.

C. Even If An Ambiguity Exists, The Rules Of Statutory Construction, When Properly Applied, Reveal A Legislative Intent To Subject Death Actions To The Medical Malpractice Noneconomic Damages Cap.

1. Deletion Of The Death Exception Reveals The Legislature's Intent To Subject Death To The Lower Cap.

It is a general rule of statutory construction that an amendment to a statute is to be construed as changing the statute amended. *Huron Twp v City Disposal Sys, Inc,* 448 Mich 362, 366; 531 NW2d 153 (1995). Further, when the Legislature "has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected." *In re MCI,* 460 Mich 396, 415; 596 NW2d 164 (1999).

As originally enacted, the noneconomic damages cap listed death as an exception. It provided:

> (1) In an action for damages alleging medical malpractice against a person or party specified in section 5838a, damages for noneconomic loss which exceeds $225,000.00 shall not be awarded unless 1 or more of the following circumstances exist:
>
> (a) *There has been a death.*
> (b) There has been an intentional tort.
> (c) A foreign object was wrongfully left in the body of the patient.
> (d) The injury involves the reproductive system of the patient.
> (e) The discovery of the existence of the claim was prevented by the fraudulent conduct of a health care provider.
> (f) A limb or organ of the patient was wrongfully removed.
> (g) The patient has lost a vital bodily function.

Apx. p 67a (emphasis added).

All exceptions to the cap were removed when the statute was amended in 1993, although certain circumstances (not including death) were subjected to a higher cap. Contrary to the Court of Appeals' speculation, removal of the exceptions to the Act can only mean one thing - that the Legislature no longer intended to except death or the other previously enumerated circumstances from the cap limitations. Extensive Legislative history supports this conclusion including legislative journals which reveal multiple defeated attempts to include death as an exception to the lower cap (but subject to the higher cap), 1993 Journal of the House at 953, 993-995, Apx. pp 90a, 92a-94a, and also reflect various protests to the 1993 Act because the cap would apply to wrongful death actions. 1993 Senate Journal at 280, 1773-1775, Apx. pp 115a, 123a-125a.

Clearly, there would have been no need to create a specific exception for death in the 1986 noneconomic damages cap if damages for loss of society and companionship were not within the definition of noneconomic loss covered by the cap in the first place. The

definition of noneconomic loss did not change from the 1986 to the 1993 statutes. Thus deletion of the death exception can only mean that the noneconomic damages cap applies to actions for wrongful death.

2. Exceptions To Statutory Enactments Are To Be Narrowly Construed.

Exemptions in a statute are to be "carefully scrutinized and not extended beyond their plain meaning." *Grand Rapids Motor Coach Co v Public Service Comm,* 323 Mich 624, 634; 36 NW2d 299 (1949); *Rzepka v Farm Estates, Inc,* 83 Mich App 702, 706-707; 269 NW2d 270 (1978)("statutory exceptions are to be given a limited, rather than expansive construction"). Further, when a statute expressly mentions one or more exceptions, other exceptions that are not mentioned cannot be implied. *See In re MCI,* 460 Mich at 415 ("The express mention of one thing in a statute implies the exclusion of other similar things."); *Kaufman v Carter,* 952 F Supp 520, 529 (WD Mich 1996)("Where 'exceptions to [a statute's] sweeping language are carefully enumerated ... the express enumeration indicates that other exceptions should not be implied.'").

There are no exceptions to the noneconomic damages cap applicable to medical malpractice actions. All exceptions, including the death exception, were deleted with the 1993 amendment. The Court of Appeals was not authorized to judicially restore an exception that the Legislature saw fit to delete. *See e.g., In re MCI* 460 Mich at 414 ("Reviewing the language of the statute, it is apparent that for § 312a to have the meaning imposed upon it by the Court of Appeals and advocated by Ameritech, the Court would need to infer additional language, not present on its face.").

3. The Legislative Purpose Supports Application Of The Cap To Wrongful Death Actions.

In upholding the constitutionality of the noneconomic damages cap in *Zdrojewski v Murphy,* 254 Mich App 50; 657 NW2d 721 (2002), the Court of Appeals noted that "the 1993 legislation that created the current finite limitation scheme was prompted by the Legislature's concern over the effect of medical liability on the availability and affordability of health care in the state", citing *House Legislative Analysis, SB 279 and HB 4033, 4403, and 4404,* April 20, 1993, pp 1-2:

> The purpose of the damages limitation was to control increases in health care costs by reducing the liability of medical care providers, thereby reducing malpractice insurance premiums, a large component of health care costs.

254 Mich App at 80. Rendering the cap inapplicable to wrongful death actions is inconsistent with this purpose. Wrongful death actions constitute a significant subset of medical malpractice actions. Exempting them from the reach of the noneconomic damages cap contravenes the legislative purpose of reducing the liability of health care providers and containing health care costs. Additionally, given the legislative purpose, there is no logical basis to distinguish between medical malpractice actions brought by a surviving plaintiff and medical malpractice actions filed by a personal representative for purposes of applying the cap.

4. The Doctrine Of Ejusdem Generis Cannot Be Applied To Avoid The Legislative Intent.

This Court has observed that the rule of ejusdem generis "is not to be invoked in every case where general words follow (or possibly precede) specific words." *In re Mosby,* 360 Mich 186, 192; 103 NW2d 462 (1960); *Utica State Savings Bank v Village of Oak Park,* 279 Mich 568, 573; 273 NW 271 (1937)("If the language used is plain, the rule of *ejusdem*

generis cannot be applied. Like other rules of construction the primary purpose of this doctrine is to ascertain the intention of those who enacted the provision.")(citation omitted). The rule is only useful in "aiding the judicial search for the sometimes elusive scrivener's intent." *In re Mosby,* 360 Mich at 192. *It may not be used to defeat the statutory purpose. Id. See also, Utica State Savings Bank,* 279 Mich at 573 (rule of ejusdem generis "should never be applied where the plain purpose and intent of the enacting body would thereby be hindered or defeated."). In *Mosby,* this Court explained:

> Where the language used, considered in its entirety, discloses no purpose of limiting the general words used, the rule of *ejusdem generis* may not be invoked to defeat or limit the purpose of the enactment.

360 Mich at 192 (citing *Utica State Savings Bank*, 279 Mich 568 and *People v O'Hara*, 278 Mich 281 (1936)).

The Court of Appeals' "ejusdem generis" analysis violates these rules. The definition of "noneconomic loss" was plainly stated by the Legislature. It is expressly defined to include the enumerated items and "other noneconomic loss." Loss of society and companionship is unquestionably other noneconomic loss. The plain language of the statute is clear. There was nothing for the Court to interpret. *See Cherry Growers Inc v Michigan Processing Apple Growers, Inc,* 240 Mich App 153, 169; 610 NW2d 613 (2000)("Where a statute sets forth its own definitions, the terms must be applied as expressly defined."); *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 136; 545 NW2d 642 (1996)("[W]hen a statute specifically defines a given term, that definition alone controls.").

Additionally, the Court's ejusdem generis analysis defeats the legislative purpose. The Legislature clearly intended the cap to apply to damages recoverable by "all plaintiffs" in actions based on allegations of medical malpractice. This intent is expressed in the plain

language of the statute and furthers the Legislature's desire to contain health care costs. Exempting all but a surviving plaintiff's damages from the reach of the cap contravenes the legislative intent. The doctrine cannot be validly applied under such circumstances.

Even if the doctrine does apply, the Court of Appeals erred in concluding that damages sought for wrongful death are not "noneconomic loss" of the same nature, class and kind as the enumerated categories. To the contrary, categories identified in the wrongful death damages provision and those identified in the noneconomic loss definition overlap. For example, both statutes provide for pain and suffering damages.

Even more importantly, damages for loss of society and companionship are not unique to wrongful death actions, but are frequently sought in personal injury actions. Indeed, in *Platt v McDonnell Douglas Corp,* 554 F Supp 360 (ED Mich 1983), the Court construed the damages recoverable under the wrongful death statute by considering what the decedent could have recovered under common law had she survived.[6] In *Taylor v Michigan Power Co,* 45 Mich App 453; 206 NW2d 815 (1973), the Court held that the trial court's addition of the words "mental anguish," "fright," and "shock" to jury instructions regarding damages recoverable in a wrongful death action was not error. Clearly, "noneconomic loss" does not demarcate between a surviving plaintiff and one whose claims are pursued by his or her estate. The Court of Appeals' demarcation is contrived.[7]

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[6] In *Platt,* defendants argued that plaintiffs could not recover for pre-impact fright and terror sustained before the plane crash in which their decedent died because the wrongful death act only allowed recovery for pain and suffering during the period intervening between the time of the inflicting of such injuries and the death. Because such damages could have been recovered by the decedent had she survived, the Court held them recoverable.

[7] The Court attempts to bolster its conclusion in noting that the Michigan Civil Jury Instruction on wrongful death damages references such items as funeral and burial expenses, loss of financial support, and loss of gifts or other valuable gratuities while MCL 600.1483 does not. *Jenkins*, 256 Mich App at 125, fn. 6. That such items would not be included in

5. The Court Of Appeals Overstepped Its Authority In Imposing Its Own Policy Aims.

The judiciary does not have the authority to judge the wisdom of a statute or to impose its own policy preferences under the guise of construction. Observing that "it is not the province of this Court to make policy judgments or to protect against anomalous results," this Court explained in *Hanson v Bd of Co Rd Comm'rs*, 465 Mich 492, 501-502; 638 NW2d 396 (2002):

> Reasonable minds can differ about whether it is sound public policy to so limit the duty imposed on authorities responsible for our roads and highways. However, our function is not to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy. Our task is to discern the intent of the Legislature from the language of the statute it enacts.

Id. at 504. Similarly, in *Decker v Flood,* 248 Mich App 75, 84; 638 NW2d 163 (2001), the Court of Appeals said:

> The Supreme Court's decision in *McIntire* precludes this Court from utilizing rules of statutory construction to impose policy choices different from those selected by the Legislature. *Id.* at 152. "In our democracy, a legislature is free to make inefficacious or even unwise policy choices. The correction of these policy choices is not a judicial function as long as the legislative choices do not offend the constitution. *Id.* at 159, adopting as its own the language of Judge Young's dissent in *People v McIntire,* 232 Mich App 71, 126; 591 NW2d 231 (1998). Clearly, it is not within our authority to second-guess the wisdom or reasonableness of unambiguous legislative enactments even where the literal interpretation of the statute leads to an absurd result.

248 Mich App at 84 (referring to this Court's decision in *People v McIntire,* 461 Mich 147, 155-158; 599 NW2d 102 (1999)).

That the Court of Appeals has not observed this line of demarcation is apparent throughout the opinion. For example, the Court said:

MCL 600.1483 is not surprising as these items represent economic loss and Section 1483 only relates to noneconomic loss.

> If we were to conclude that the damages cap controlled, it would result at best, from a plaintiff's standpoint, in a recovery limited at $500,000; an amount equal to the limit on damages recoverable for injuries short of death. Without specific direction from the Legislature, we are not prepared to say that the Legislature intended to place an equal or lesser value on a person's life.

Jenkins, 256 Mich App at 127. The Court further insisted that if, in reading the statutes together, it concluded that the damages cap controlled, it would render nugatory the wrongful death act "require[ment]" that the jury determine damages in a fair and equitable amount. *Id.* at 128-129, fn 9. These statements by the Court of Appeals reveal its belief that $500,000 is not a sufficient recovery for death. However, the Court of Appeals was not empowered to rewrite the noneconomic damages cap provision to more closely conform to its own policy aims. Any revisions to the statute must come from the Legislature.

6. The Other Justifications Employed By The Court Of Appeals To Exempt A Wrongful Death Action From The Noneconomic Damages Cap Are Meritless.

The Court of Appeals' remaining rationales are equally unavailing. The assertion that it was "incumbent" on the Legislature to include some language in § 1483 to "specifically indicate its intent that the damages cap applied in wrongful death actions in order to avoid any conflict" is unsupported by any authority. Also unavailing is the Court's conclusion that assuming an irreconcilable conflict between the statutes, the wrongful death action governs because it "more specifically denotes the type of damages ..." *Jenkins, supra,* 256 Mich App at 128.

The wrongful death act is not the more specific statute. It very generally applies to all actions for wrongful death, irrespective of the underlying liability theory. The noneconomic damages cap, on the other hand, applies to a subset of such actions – those asserting claims for medical malpractice. "Where two acts or provisions are in conflict, the

more specific act will apply." *Township of Huron v City Disposal Systems, Inc,* 448 Mich 362, 373; 531 NW2d 153 (1995)(Riley J, dissenting). As Justice Riley explained:

> Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act, as the Legislature is not to be presumed to have intended a conflict.

Id., quoting *Wayne Co Prosecutor v Wayne Circuit Judge,* 154 Mich App 216, 221; 397 NW2d 274 (1986), citing *Crane v Reeder,* 22 Mich 322 (1871). That the wrongful death statute should not have been erected as a bar to application of the noneconomic damages cap is also evidenced by the "doctrine of last enactment" which "presumes that the Legislature is aware of the existence of the law in effect at the time of its enactments and recognizes that, since one Legislature cannot bind the power of its successor, *existing statutory language cannot be a bar to further exceptions set forth in subsequent, substantive enactments."* *Pittsfield Charter Township v Washtenaw County,* 468 Mich at 713 (emphasis added). The Legislature is thus presumed to have known of the wrongful death recovery statute when it enacted the noneconomic damages cap without an exception for wrongful death.[8]

The fact that other statutes have defined noneconomic loss to include damages for loss of society and companionship but the noneconomic damages cap does not is also a red herring. The Court must construe this statute according to its own plain language in light of

[8] Contrary to the Court of Appeals' conclusion, the Legislature's presumed awareness of the wrongful death statute did not make it "incumbent on the Legislature to include some language in § 1483 to specifically indicate its intent that the damages cap applied in wrongful death actions in order to avoid any conflict." *Jenkins*, 256 Mich App at 127. Rather, the Legislature likely did not perceive there to be any conflict between the wrongful death act and the noneconomic damages act, and could very well have understood that its later enactment would control.

its own statutory purpose. The Legislature's choice of words for other statutes is not illuminating.

D. Wrongful Death Actions Are Subject To The Rules Which Govern The Underlying Claim.

Exempting wrongful death actions from the noneconomic damages cap is contrary to case law which holds that rules applicable to the underlying claim govern a wrongful death action. For example, in *Hawkins v Regional Medical Laboratories, supra,* this Court held that a wrongful death action accrues as provided by the statutory provisions governing the underlying liability theory. Similarly, in *Lindsey v Harper Hosp,* 213 Mich App 422; 540 NW2d 477 (1995), aff'd 455 Mich 56; 564 NW2d 861 (1997), the Court of Appeals said that in a wrongful death action, the period of limitations is governed by provisions applicable to the liability theory involved. In *Wilson v Dep't of Mental Health*, 19 Mich App 558; 172 NW2d 891 (1969), the statutory requirement that the state be given notice of a claim six months prior to filing, was applied in a wrongful death action. *See also, Weisburg v Lee,* 161 Mich App 443; 411 NW2d 728 (1987)(rejecting plaintiff's assertion that decedent's death created a separate wrongful death action not governed by the statute of limitations applicable to medical malpractice actions.).

Wrongful death actions alleging medical malpractice are unquestionably subject to other medical malpractice tort reform provisions, such as the requirement that 182 days notice of intent to sue be given before commencing an action for medical malpractice, MCL 600.2912b, the requirement that an affidavit of merit be filed with the complaint, MCL 600.2912d, and the requirement that experts actively practice in the same specialty as defendant, MCLA 600.2169, among others. The Court of Appeals' decision conflicts with this well-established practice.

CONCLUSION

In *People v McIntire, supra,* this Court had occasion to review a Court of Appeals majority decision which held that an obligation to provide truthful answers is an implicit condition of an immunity agreement under MCL 767.6. Adopting the dissenting opinion of then Court of Appeals Judge Young, now Justice Young, as its own, the Supreme Court commented on what it perceived as an abandonment of traditional rules of statutory construction:

> These traditional principles of statutory construction thus force courts to respect the constitutional role of the Legislature as a policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility. Any other nontextual approach to statutory construction will necessarily invite judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences. ... *Unfortunately, the [Court of Appeals] majority has abandoned these traditional rules of construction, ignored the plain text of the statute before us, and substituted its own policy preferences for those of our Legislature ... While [we] do not question the sincerity of [the Court of Appeals majority's] effort, [we] view the [Court of Appeals] opinion as a herculean, yet ultimately unsuccessful, attempt to create an ambiguity where none exists in order to reach a desire result ...*

461 Mich at 153 (emphasis added). With all due respect, the same can be said of the Court of Appeals' decision here and the same remedy is required. Thus reversal is respectfully requested.

RELIEF REQUESTED

Amicus Curiae Michigan State Medical Society therefore requests that this Court reverse the April 1, 2003 published decision of the Michigan Court of Appeals and hold that the medical malpractice noneconomic damages cap applies to wrongful death actions.

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